No. 86-763

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

W. NYLES SPURLOCK,

Petitioner,

v.

LOIS E. WREN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The petition presents no issue that warrants this Court's consideration, and accordingly should be denied.

COUNTER-STATEMENT OF THE CASE

A somewhat fuller exposition of the facts may be helpful to the Court in evaluating the petition.

A. The Community, the School, and the History of Community Controversy About Spurlock's Performance as Principal.

Petitioner Spurlock was the principal of the public school in Baggs, Wyoming, and Respondent Wren was a

teacher in that school. Baggs is a small town with a population of 600, located in the Snake River Valley; the Valley's total population is only 1,000 (X:179). The school contains within one building all grades from first through 12th. There are 17 teachers in the school. Because Baggs is geographically isolated, and 77 miles from the city where the School Superintendent is located (Rawlins), the principal in Baggs has greater autonomy than would be true of most principals (I Supp:13-14).

In Baggs, the school is "the hub of the community" (X:167, 170, 179). Almost everyone in the community is connected in some way with the school, which is the focus of "community social and political relations" (X:180, 201).

Spurlock came to Baggs as principal in 1973 (XII: 6-7), and his performance as principal was, throughout his tenure, a matter of public controversy. Long before the events that gave rise to this lawsuit, the Board of Trustees had conducted hearings, at the behest of complaining parents, about Spurlock's performance (IX:121; X:31-33, 145-47; PX 450:2).

B. Wren's First Five Years With Spurlock.

Wren began teaching at Spurlock's school in 1974, a year after Spurlock arrived (VI:361). Spurlock repeatedly recommended renewal of Wren's teaching contract, with the result that Wren acquired tenure (IV:74-78), and as Spurlock testified at trial, there were "no major problems" between them until 1979 (IV:90-91; XII:240). Wren was considered a good teacher by both the School Superintendent and the Board of Trustees (IX:42, 90, 134).

On October 24, 1979, Wren filed a grievance alleging that Spurlock was enforcing "rules" against her (some of which were not in writing and that she had not known existed) that were not enforced against other teachers (PX 45:1, 18; V:365).

The Board of Trustees held a hearing on the grievance on December 5, 1979, at which several teachers testified that Spurlock discriminated as between teachers in his enforcement of the rules (IV:163-64; V:245, 313-315). The Board found that both Spurlock and Wren were at fault, and resolved the grievance by ordering Spurlock not to discriminate in enforcing rules and ordering Wren to obey the rules.

Spurlock's next evaluation of Wren following resolution of the grievance, dated February 6, 1980, gave Wren high marks in every category (PX 81); the evaluation was, as Spurlock testified, "one I would like to receive" (XII:119).

C. The WEA Controversy.

Spurlock's favorable opinion of Wren ended abruptly, however, when Wren joined with other teachers to request an investigation by the Wyoming Education Association (WEA) of practices at the school. On April 18, 1980, a majority of the school's faculty—nine teachers, including Wren—addressed a letter to the WEA listing 35 categories of "concerns" and requesting "an investigation by the W.E.A. into the administration and administration related problems" (PX 305).

Parents, students and other community members had had input in the preparation of the letter (V:276, 296, 328, 394). While some of the "concerns" listed in the letter involved Spurlock's treatment of teachers, many involved Spurlock's treatment of students, his behavior toward parents, his misuse of school equipment, and the quality of the educational process (PX 305). The uniform testimony, including that of the School Superintendent and other school officials, was that all the matters listed in the letter were of great public interest and controversy in the community (IX:67-68, 107-108; X:79, 145, 222; XI:75; II Supp. 29).

Upon receipt of the letter, the WEA undertook an extensive investigation, interviewing teachers, parents, and students (V:328). On the basis of its investigation, the WEA wrote to the School District that it had determined there was "a severe problem" respecting Spurlock's administration of the school (PX 320:1), which it wished to discuss with the Board of Trustees (*id.* at 5). The letter recounted *inter alia* the following complaints about Spurlock that the WEA had received in the course of its investigation (*id.* at 2-4):

> 1. A female student was forced to submit to a "strip search" at the order of the principal. Two female teacher employees were ordered by the principal to conduct the "strip search" and the search was conducted. No contraband or drugs were recovered.
>
> 2. A female student was subjected to a one hour questioning session regarding family life, past and present boyfriends, sexual relations that may have occurred, and other private matters. The original reason for the conference was to discuss mid-term graduation.
>
> 3. A female teacher has been asked if she was "a virgin"; with whom she had slept; and whether she was sexually frustrated.
>
> 4. A female student was asked if she had had sexual relations with her father; told that she should have sex with a married man; and was offered the opportunity to make a doctor's appointment to obtain birth control pills.
>
> 5. Female students have had private counseling sessions with [Spurlock] with regard to their social and sexual activity.
>
> * * * *
>
> 7. Blood relatives of [Spurlock], who do not possess the necessary credentials, have been used as substitute teachers.

8. A teacher was publicly embarrassed by [Spurlock] for the reason that the teacher voted against [Spurlock's] position while serving on a student grievance committee.

* * * *

11. Use of school van for personal purposes on out of town trip.

12. Discriminatory and inconsistent enforcement of faculty rules.

13. Discriminatory and inconsistent enforcement of pupil rules.

* * * *

15. Objected to the formation of a PTA.

* * * *

17. Retaliation against students for parental disagreement with administrative decisions.

* * * *

19. Failure to grant tenure to 90% of the teachers employed by the school.

20. Contradictory policies on grading.

* * * *

29. The changing of a student's grade without consultation with the teacher.

* * * *

31. Excessive mood swings from exhiliaration to depression.

32. Leaving school grounds during school hours without cause.

33. Taping of conversations

34. Expulsion and denial of graduation to student with 25 days left prior to graduating.

The Board of Trustees decided to meet with the WEA representatives (IX:62-63). Spurlock was outraged. He wrote to the Board President "object[ing] to the meet-

ing" (PX 450:1), asserting that "the Board is nurturing small town politics" (*id.* at 3). He argued:

> I am dumbfounded. I can't believe the board is going to listen to this W.E.A. so-called investigation. . . .
>
> . . . Gathered along with the teachers [at the WEA's investigative hearing] were the "town drunks, pushers" and parents of the students who had gotten into trouble at school. . . .
>
> * * * *
>
> The W.E.A. and this group are doing nothing but attempting to keep the school upset, the town upset, and harassing the school district. . . .
>
> With all due respect, I am not sure the Board understands the small town politics aspects of Baggs.
>
> [The letter here recounted, disapprovingly, prior instances in which the Board had conducted hearings at the request of parents complaining about Spurlock]
>
> * * * *
>
> We are going to hear what a group of teachers, some mad parents, students, W.E.A., and anyone else who is against Spurlock. They are together. . . . Again the Board is nurturing small town politics. Just because they number, don't make them right.
>
> * * * *
>
> In summary, I feel we as a team, the Board and its Administrator, are letting outside groups come in, yell wolf trying to destroy ourselves. [PX 450: 1-4.]

In the course of the letter, Spurlock noted that the controversy surrounding his performance had been the subject of extensive newspaper coverage (*id.* at 3).

After meeting with the WEA, the Board decided to hire its own investigator to look into the allegations (II Supp:63). In December, 1980, on the basis of the investi-

gator's report, the Board voted to reprimand Spurlock on three counts: improper strip search of a female student, talking about students' "private lives," and illegal or unauthorized use of the school bus (IV:122; IX:226-227; PX 289-A).[1]

D. Spurlock's Harassment of and Retaliation Against Wren Following the WEA Letter.

Spurlock perceived Wren to have been the catalyst for the WEA investigation (PX 450:1).[2] Soon after the letter to the WEA was sent, Spurlock commenced a reign of terror against the signers, and most particularly against Wren. On the day he learned of the letter, Spurlock called Wren out of her classroom; he was "very angry, almost furious" (VI:13-14). A few days later, Spurlock referred to the WEA letter and told Wren he was going to "watch every move" she made (VI:63). In the ensuing days, weeks, and months, Spurlock engaged in the following forms of harassment of Wren:

1. Spurlock began visiting Wren's classes on a regular basis—sometimes several classes on a single day—standing and watching without comment. The frequency of these visits to a single teacher's classroom was unprecedented, wholly unlike the periodic "observations" done for the quarterly evaluations; students testified at trial that

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[1] The trial court granted a motion *in limine* filed by defendants prior to commencement of the trial, precluding the submission of factual evidence supporting the Board's findings and the correctness of the other complaints made by the teachers to the WEA, and precluding as well introduction of the fact that Spurlock ultimately was dismissed by the Board of Trustees for misconduct (IV:4-14).

[2] Spurlock was correct to this extent: although there were nine teachers, as well as parents and others, who wished to bring the matters recited in the WEA letter to the Board's attention—the Board being 77 miles away—it was Wren who suggested that the most effective vehicle would be a letter to the WEA requesting an investigation (V:380).

the visits unnerved them (VI:14; XII:250; XIII:12-13; PX 176).

2. Spurlock began imposing wholly arbitrary and eccentric rules on Wren—rules that never had existed before and that were not applied to other teachers—and prepared written "reprimands" (with copies to the Superintendent) alleging that Wren was repeatedly violating these rules; the allegations were usually false, but even when not, the "violation" was not something that occasioned a reprimand when committed by other teachers. For example, Wren alone was not allowed to send students from the classroom to borrow equipment, or to get books from the library, or to perform other school-related functions, and Spurlock watched Wren's classroom to catch her in "violations" of this newly-created rule. Numerous teachers and students testified to a variety of "rules" that were applied to and enforced against Wren but not against others. (IV:160-61, 164, 175-77; V:242-43, 247, 264-65, 273-74, 385-86; VI:6-7, 11-12, 75-81; VII:13, 87; XI:79-80, 86; XII:191-92, 217; XIII:9, 34-35; PX-176.)

3. Spurlock's first formal evaluation of Wren after the WEA letter came on May 6, 1980 (PX 87). In contrast to the prior evaluation, which had been glowing (*see* p. 3, *supra*), this one was extremely negative (VI: 83-85). Among Spurlock's comments on the evaluation was that Wren was "splitting the faculty" (VI:63-64), a reference to the WEA letter (XIII:125, 192-95).

4. On May 14, 1980, Spurlock called the Superintendent and asked that he come to Baggs because Wren was flagrantly disobeying rules. The Superintendent journeyed to Baggs that day, and conducted a lengthy meeting with Spurlock and Wren. Repeatedly during the meeting, Spurlock stated: "If Mrs. Wren is going to disagree with me . . . I am going to apply the rules strictly to her" (IX:71). At the conclusion of the meeting, based on Spurlock's recital of supposed rule violations by Wren

(all of which were false or committed by other teachers with impunity, VI:17-29, 31-32)), the Superintendent told Wren that she was suspended with pay (II Supp. 23). Later that day, the Superintendent rescinded the suspension; he had talked to the School District's attorney and concluded that he had "goofed" (II Supp. 23; IX:22-23, 79-82).

5. On June 3, 1980—the last day of the school year—Spurlock summoned Wren to his office and lectured her for two hours. He told her that he had retained a lawyer and was planning to sue her for slander because of the allegations in the WEA letter. He told her that "if" she returned for the following school year he was going to eliminate some of her classes, and would not order supplies for her. He said that she would be alone amongst the faculty. He falsely accused her of continuing to violate the rules (VI:64-67).

6. The campaign of harassment by Spurlock continued unabated through the following school year (1980-81); indeed, following the Board of Trustees' reprimand of Spurlock in December, 1980, the written "reprimands" of Wren accelerated (PX-176; VI:75-82).

7. Only four of the nine signers of the WEA letter had returned to teach in the 1980-81 school year. When it came time for the Board to consider contracts for the following (1981-82) school year, Spurlock recommended that all four of the remaining signers (including Wren) not be renewed (IV:128-30, 181-82). The Board of Trustees rejected Spurlock's recommendation as to all four, and offered each a new contract, on the advice of the Board's attorney that there were not grounds justifying non-renewal (II Supp. 40-42; IX:128).

E. The Effect of Spurlock's Harassment Upon Wren.

Spurlock's daily harassment of Wren—which continued for more than a year—drove Wren into clinical depression, and ultimately rendered her unable to continue her teaching career. Wren experienced insomnia,

weight loss, colitis, and uncontrollable crying spells (III: 104-105). The unanimous consensus of five psychiatrists is that by the end of the 1980-81 school year she was clinically depressed (VIII:190; XI:29-30, 144-45; III Supp. 21, 27).

After the Board of Trustees had voted despite Spurlock's recommendation to renew Wren's contract for the 1981-82 school year, Wren requested a one-year leave of absence, on the ground that she was unable physically or mentally to continue teaching; the Board granted an unpaid leave of absence (VI:86-88). Wren likewise did not return for the 1982-83 school year, advising the Board that she still did not feel well enough to teach (VI:94). At the time of trial, Wren was still eligible to return to her teaching position, but in a mid-trial settlement reached between Wren and the School District, Wren agreed *inter alia* to relinquish her employment status in consideration for a monetary payment from the School District.

ARGUMENT

We address petitioner's four questions presented *seriatim*, and show that none warrants this Court's consideration.

1. *The "Pickering" Balance.*

In *Connick v. Myers*, 461 U.S. 138 (1983), this Court announced two discrete principles that are applicable when a public employee challenges an adverse employment action visited in response to the exercise of First Amendment rights. The first principle is that such an adverse employment action is unconstitutional only if the content of the First Amendment exercise involves "a matter of public concern." *Id.* at 143-49. In this case, the district court and court of appeals both concluded that Wren's First Amendment activities involved matters of public concern (A 5-6). That conclusion is plainly correct on this record (*supra*, pp. 3-7), and Spurlock does not ask that this Court review that determination.

Rather, Spurlock seeks review respecting the second principle announced in *Connick*, a principle derived from *Pickering v. Board of Education*, 391 U.S. 563 (1968): that even where an adverse employment action is motivated by First Amendment activities involving matters of public concern, the constitutionality of that interference depends upon balancing the public interest in receiving the teacher's communication against the government's interest "in the effective and efficient fulfillment of its responsibilities to the public," *i.e.*, its interest, *qua* employer, in avoiding "disruption of the office and the destruction of working relationships" (*Connick*, 461 U.S. 149-54). The court below struck this balance in favor of Wren, finding dispositive the Board of Trustees' decision to renew Wren's employment following her exercise of First Amendment rights (A 6-7). Spurlock asks this Court to grant certiorari and strike the balance anew.

Spurlock simply misunderstands the *Pickering* balancing test. Assuming *arguendo* that Wren's activities *could* have been seen as creating such a disruption of "harmony in the workplace and close working relationships" (Pet. 13) as to have *empowered* the Board of Trustees to dismiss Wren consistent with the *Pickering* balance,[3] the dispositive fact is that the Board, whose responsibility it was to make that judgment, renewed Wren's employment in each of the two years following those activities.[4]

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[3] Although the question was not presented in this case (because the Board of Trustees voted *not* to dismiss Wren), we believe the *Pickering* balance would not have permitted the dismissal of Wren on the facts of this case. For whatever disharmony may have eventuated from Wren's activities, that surely was outweighed by the public interest in learning of the serious defalcations by Spurlock that Wren and her colleagues brought to light. *See*, *Connick*, 461 U.S. at 152, 154.

[4] Indeed, even Spurlock did not seek Wren's removal in the first of those years. And while he did seek Wren's removal in the second year after the WEA letter had ripened into a reprimand of Spurlock by the Board of Trustees for misconduct, the Board

The responsible education officials in the community having concluded that Wren's actions did *not* preclude her continued employment, there is no room for a federal court to strike the balance differently. *See, Connick*, 461 U.S. at 151-52. And the government interest to be balanced under *Pickering* ends with that determination. There is surely no legitimate government interest served by a superior's engaging in a campaign of day-to-day harassment of a subordinate as punishment for the latter's exercise of First Amendment rights. Spurlock offers nothing to show how, by driving Wren to physical and mental ruin, he served "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees". (*Pickering*, 391 U.S. at 568).

2. *Was There "Constitutional Infringement"?*

Spurlock's second question presented asks whether "retaliation for exercise of First Amendment rights . . . rise[s] to a level of constitutional infringement where it consists of . . . harassment, and does not involve suspension, termination, demotion, transfer, reduction of benefits, or other such significant alteration of employment status." This question was not raised in the court below, nor was it addressed or decided by that court.

Even if the question *had* been raised in the court below, it would not warrant this Court's attention, for two reasons:

First, the question is not presented on the facts of this case. This is not a case where the sole injury was receipt of verbal abuse. Rather, this is a case where the defendant's behavior drove the victim to a state of clinical depression, and caused the victim to lose at least two years' employment because of physical and mental in-

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rejected that suggestion, concluding that there was no justification for Wren's removal (see p. 9, *supra*).

capacity to teach. In legal terms, this was a constructive discharge—plainly a "significant alteration of employment status."

Second, the question would not warrant this Court's attention even were it presented by the facts (*i.e.*, even if the lone injury inflicted was mental suffering). This Court has held that "mental and emotional distress" caused by constitutional violations is "compensable under § 1983." *Carey v. Piphus*, 435 U.S. 247, 264 (1978). Plainly, the intentional infliction of such injury, by the means employed here (*supra*, pp. 7-9), in retaliation for the exercise of constitutional rights, is actionable under § 1983. Indeed, given the origin of § 1983 as an effort to respond to the campaigns of terror conducted by the Ku Klux Klan, *Wilson v. Garcia*, 471 U.S. 261 (1985), it would be startling indeed—and welcome news to the Klan—if harassment such as occurred here did not "rise to the level of a constitutional infringement."

3. *Were the Instructions Taken As A Whole "Plainly Erroneous?"*

Spurlock's third question presented is whether the trial court's instructions, taken as a whole, were "plainly erroneous." As this formulation suggests, and as Spurlock acknowledges in the body of the petition (at 15), many of the instructions about which he now complains were "not objected to" in the trial court. Indeed, many were not objected to in the court of appeals, either. (The only instructions and interrogatories challenged in the court of appeals are those discussed in the court of appeals' opinion (A 11-15).[5] Spurlock thus would elevate

[5] Spurlock in *this* Court complains (Pet. 21-22) about the legal correctness of Instructions 14 and 15 (grouped into category I in the petition). But in the lower courts, Spurlock did not challenge those instruction as legally erroneous; rather he challenged those instructions *only* on the ground that the record did not contain evidence warranting the giving of those instructions, and that is

the plain error rule to a hitherto unprecedented level: he would have this Court grant certiorari to determine whether plain error was committed by the giving of instructions that were neither objected to in the trial court nor challenged as plain error in the court of appeals.

Petitioner does not seek review in this Court of any particular instruction or interrogatory, but rather of the impact of all the instructions and interrogatories "taken as a whole" (Pet. 15). That question does not warrant this Court's attention for at least the following reasons: it was not presented to the court of appeals; it was not presented as an objection in the district court and thus could be cognizable only if plain error; the court below correctly stated the principles that govern the application of the plain error rule (A 12), and this case thus presents no question of generic importance as to the meaning of that rule; any determination that the instructions here taken as a whole were plainly erroneous would be significant only as to this case and would have no precedential effect whatsoever; and, for the reason stated by the court below in rejecting the one "plain error" contention made to it, the plain error rule is inapplicable here because, reading the entirety of the instructions and interrogatories (which are selectively and inaccurately characterized in the petition) "the jury in this case repeatedly received accurate information on the nature of the case and on the necessity for finding a violation of Wren's constitutional rights before awarding damages" (A 12). What is more, there is no error at all, let alone plain error, in the instructions, either individually or taken as a whole.

The trial of this case consumed ten days, and the district court conducted an extensive dialogue with counsel

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the only challenge to those instructions that the court below considered (A 12-13).

respecting its proposed instructions and interrogatories before charging the jury. Spurlock was represented throughout those proceedings by able, experienced counsel. In these circumstances, Spurlock's hitherto unsurfaced quibbles about the instructions and interrogatories hardly warrant a first airing in this Court.

4. *The Set-off Issue.*

Spurlock's fourth question presented is whether there is "indivisible injury *as a matter of federal law*" (emphasis added) such that Spurlock is entitled to a set-off of the amount received by Wren from the two settling defendants. For two reasons, that question does not warrant this Court's attention.

First, contrary to Spurlock's supposition, the question he proffers is not one of federal law, for Wyoming law controls the availability of set-off in this case. As this Court has explained, 42 U.S.C. § 1988, which governs § 1983 actions such as the instant case,

> recognizes that in certain areas "federal law is unsuited or insufficient 'to furnish suitable remedies' "; federal law simply does not "cover every issue that may arise in the context of a federal civil rights action." . . . When federal law is thus "deficient," § 1988 instructs us to turn to "the common law, as modified and changed by the constitution and statutes of the [forum] State," as long as these are "not inconsistent with the Constitution and laws of the United States."

Robertson v. Wegmann, 436 U.S. 584, 588 (1978) (citations omitted). *See also, Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984). There is no federal law of contribution, *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77 (1981), and the same is true as to set-off. Thus, the *Robertson* principle dictates that the availability of set-off is governed by Wyoming law. *Accord: Johnson v. Rogers*, 621 F.2d 300, 304 & n.6 (8th Cir. 1980). Cer-

tiorari is not warranted to resolve a question of Wyoming law.[6]

Second, both the district court and court of appeals found *as fact* that the injury suffered by Wren at the hands of Spurlock was distinct from the injury she suffered at the hands of the other two defendants (A 16-17). Even if the question of set-off were governed by federal law, there is no occasion for this Court to address a factual question that can have no precedential significance, the more so as the lower courts agreed on the resolution of that factual question.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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[6] The court below found it unnecessary to decide whether federal or Wyoming law governs the set-off issue (A 16), in light of its factual determination discussed next in text.